JENNIFER ANNE HARPER A

v.

TIMOTHY THESEIRA

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CIVIL APPEAL NO: P-04-188-08]
19 JANUARY 2011 C

CIVIL LAW ACT: *Damages - Dependency claim - Fatal accident - Loss of support - Age of deceased at time of death - Whether claim precluded by virtue of proviso in s. 7(3)(iv)(a) Civil Law Act 1956 - Intention of Parliament - Whether various annuities and pension payments received by deceased were "earnings" under s. 7(3)(iv)(a) - Civil Law Act 1956, ss. 7(3)(iv)(a), (11), 28A(2)(c)(i)* D

DAMAGES: *Fatal accident - Dependency claim - Loss of support - Age of deceased at time of death - Whether claim precluded by virtue of proviso in s. 7(3)(iv)(a) Civil Law Act 1956 - Intention of Parliament - Whether various annuities and pension payments received by deceased were "earnings" under s. 7(3)(iv)(a) - Civil Law Act 1956, ss. 7(3)(iv)(a), (11), 28A(2)(c)(i)* E

STATUTORY INTERPRETATION: *Construction of statutes - Legislation by reference - Section 28A(2)(c)(i) Civil Law Act 1956 substantially in pari materia with s. 7(3)(iv)(a) Civil Law Act 1956 - Whether interpretation given by case authorities to s. 28A(2)(c)(i) applicable mutatis mutandis to s. 7(3)(iv)(a) - Intention of Parliament - Civil Law Act 1956, ss. 7(3)(iv)(a), 28A(2)(c)(i)* F G

WORDS & PHRASES: *"earnings" - Civil Law Act 1956, s. 7(3)(iv)(a) - Meaning of*

The appellant/plaintiff was the lawful widow of the deceased at the time of his demise at 68 years of age (due to injuries sustained in a road accident). She instituted a personal injury action against the respondent/defendant. The Sessions Court found the defendant liable and awarded general damages for pain and suffering, damages for nervous shock and agreed special damages, but dismissed the plaintiff's claim for loss of support. The plaintiff's subsequent appeal against the Sessions Court's decision relating to H I

A loss of support was dismissed by the High Court. Hence, the present appeal in which the plaintiff submitted that her claim should be allowed as she was claiming damages for loss of support based on the deceased's sources of income from various annuities and pension payments. The defendant, however, contended that: B (i) as the deceased was 68 years of age at the time of his demise, the plaintiff's claim was precluded by virtue of s. 7(3)(iv)(a) of the Civil Law Act 1956 ('Act'); and (ii) the various annuities and pension payments received by the deceased were actually "earnings" under s. 7(3)(iv)(a) of the Act.

C

Held (dismissing the appeal with costs)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) The proviso in s. 7(3)(iv)(a) of the Act precludes any award for loss of dependency where the deceased had attained 55 D years of age at the time of his demise. Section 28A(2)(c)(i) of the same Act is substantially *in pari materia* with s. 7(3)(iv)(a), and the interpretation which the case authorities have given to s. 28A(2)(c)(i) is indeed applicable *mutatis mutandis* to s. 7(3)(iv)(a). In the present appeal, the intention of E Parliament expressed in the proviso was clear and unambiguous, which was to bar the plaintiff's claim for loss of support since the deceased was 68 years of age at the time of his demise. *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* (foll); *Tan Hairuddin & Satu Lagi lwn. Bayeh Belalat* (foll); F *Abdul Aziz Alla Pichai v. Fan Chin Siang* (foll). (paras 10-14)

(2) Based on the dictionary meaning of "earnings" and "annuity", the definition of "pension" in s. 7(11) of the Act and the plaintiff's own evidence that the annuities and pension G payments were subject to tax under English law, such annuities and pension payments were within the meaning of the word "earnings" contained in s. 7(3)(iv)(a) of the Act. As the deceased was 68 years old at the time of his death, there could be no award of loss of support arising from "earnings" H under s. 7(3)(iv)(a) of the Act. Both the Sessions Court and the High Court were, therefore, correct in law in dismissing the plaintiff's claim under this head. *Lee In Fong & Satu Lagi lwn. Zahara Johan* (dist). (para 18)

I

Bahasa Malaysia *Translation Of Headnotes*

Perayu/plaintif adalah balu sah si mati pada masa kematiannya pada umur 68 tahun (disebabkan kecederaan yang dialami dalam suatu kemalangan jalanraya). Beliau memulakan tindakan kecederaan diri terhadap responden/defendan. Mahkamah Sesyen mendapati bahawa defendan bertanggungjawab dan mengaward gantirugi am untuk kesakitan dan penderitaan, gantirugi untuk kejutan saraf dan gantirugi khas yang disetujui, tetapi menolak tuntutan plaintif untuk kehilangan penyara. Rayuan kemudiannya plaintif terhadap keputusan Mahkamah Sesyen berhubungan dengan kehilangan penyara telah ditolak oleh Mahkamah Tinggi. Oleh yang demikian, rayuan semasa dalam mana plaintif menghujah bahawa tuntutannya sepatutnya dibenarkan kerana beliau menuntut gantirugi untuk kehilangan penyara berdasarkan sumber-sumber pendapatan si mati dari beberapa anuiti-anuiti dan pembayaran saraan. Defendan, walau bagaimanapun, menghujah bahawa: (i) oleh kerana si mati berusia 68 tahun pada masa kematiannya, tuntutan plaintif dikecualikan oleh s. 7(3)(iv)(a) Akta Undang-Undang Sivil 1956 ('Akta'); dan (ii) anuiti-anuiti dan pembayaran saraan yang diterima oleh si mati adalah sebenarnya "pendapatan" di bawah s. 7(3)(iv) (a) Akta.

Diputuskan (menolak rayuan dengan kos)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Proviso dalam s. 7(3)(iv)(a) Akta mengecualikan apa-apa award untuk kehilangan penanggung di mana si mati telah berusia 55 tahun pada masa kematiannya. Seksyen 28A(2)(c)(i) Akta yang sama adalah secara substantif *in pari materia* dengan s. 7(3)(iv)(a), dan pentafsiran yang diberi oleh otoriti kes kepada s. 28A(2)(c)(i) boleh digunapakai *mutatis mutandis* kepada s. 7(3)(iv)(a). Di dalam rayuan semasa, niat Parlimen yang dinyatakan dalam proviso adalah jelas dan nyata, iaitu untuk menghalang tuntutan plaintif untuk kehilangan penyara disebabkan si mati berusia 68 tahun pada masa kematiannya. *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* (diikuti); *Tan Hairuddin & Satu Lagi lwn. Bayeh Belalat* (diikuti); *Abdul Aziz Alla Pichai v. Fan Chin Siang* (diikuti).

(2) Berasaskan maksud kamus "pendapatan" dan "anuiti", definisi "saraan" dalam s. 7(11) Akta dan keterangan plaintif sendiri bahawa anuiti-anuiti dan pembayaran saraan tertakluk kepada cukai di bawah undang-undang Inggeris, anuiti-anuiti dan pembayaran saraan sebegitu terangkum di bawah maksud perkataan "pendapatan" yang dikandungi dalam s. 7(3)(iv)(a) Akta. Oleh kerana si mati berusia 68 tahun pada masa kematiannya, tidak ada award untuk kehilangan penyara yang timbul dari "pendapatan" di bawah s. 7(3)(iv)(a) Akta. Kedua-dua Mahkamah Sesyen dan Mahkamah Tinggi adalah, oleh itu, betul di sisi undang-undang ketika menolak tuntutan plaintif di bawah tajuk ini. *Lee In Fong & Satu Lagi lwn. Zahara Johan* (dibezakan).

Case(s) referred to:

Abdul Aziz Alla Pichai v. Fan Chin Siang @ Fun Kim Siong [1997] 1 LNS 313 HC ***(foll)***

Lee In Fong & Satu Lagi lwn. Zahara Johan [1992] 4 CLJ 2108; [1992] 1 CLJ (Rep) 479 HC ***(dist)***

Tan Hairuddin & Satu Lagi lwn. Bayeh Belalat [1990] 2 CLJ 775; [1990] 1 CLJ (Rep) 529 HC ***(foll)***

Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 SC ***(foll)***

Legislation referred to:

Civil Law Act 1956, ss. 7(3)(iv)(a), (11), 28A(2)(c)(i)

For the appellant - JJ Chan (Farleela Azli with him); M/s Shearn Delamore & Co

For the respondent - T Tharumarajah (Anantharajah Jhanangata with him); M/s Azim, Tunku Farik & Wong

[Appeal from High Court, Pulau Pinang; Civil Appeal No: 12-201-2005 [MT-4]]

[Editor's note: For the High Court judgment, please see Jennifer Anne Harper v. Timothy Theseira [2009] 2 CLJ 499.]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] We set out below the grounds of our judgment in dismissing the appeal by the appellant (the plaintiff) against the decision of the learned High Court Judge who had dismissed the plaintiff's claim for loss of support under s. 7 of the Civil Law Act 1956.

Factual Background

[2] The plaintiff is the lawful widow of Mr Bernard Alfred Harper (deceased) who had succumbed to injuries sustained in a road accident on 19 February 1998. At the time of his demise, the deceased was 68 years of age.

[3] The plaintiff instituted a personal injury action against the respondent ("the defendant"). At the conclusion of the trial, the Sessions Court found the defendant liable and awarded general damages for pain and suffering, damages for nervous shock and agreed special damages. However, the Sessions Court dismissed the plaintiff's claim for loss of support.

[4] As indicated above, the plaintiff's appeal against the decision of the Sessions Court relating to loss of support was dismissed by the High Court.

[5] Hence, this appeal by the plaintiff.

Section 7(3)(iv)(a) Of The Civil Law Act 1956

[6] Mr J J Chan (assisted by Ms Farleela Azli) submitted that the plaintiff's claim for loss of support should be allowed as the plaintiff was claiming damages for loss of support based on her deceased husband's sources of income from various annuities and pension payments which in turn were the sources of financial support enjoyed by the plaintiff during the lifetime of her deceased husband. Support was sought in *Lee In Fong & Satu Lagi lwn. Zahara Johan* [1992] 1 CLJ (Rep) 479 HC.

[7] Mr T Tharumarajah (Mr Anantharajah Jhanangata) supported the decision of the High Court in dismissing the plaintiff's claim for loss of support, on the following grounds:

A (1) that as the deceased was 68 years of age at the time of his demise, the plaintiff's claim for loss of support was precluded by virtue of s. 7(3)(iv)(a) which provides that the loss of earnings of a person deceased shall not be taken into consideration where the person deceased has attained the age
B of 55 years at the time of his death, based on *Tan Hairuddin & Satu Lagi lwn. Bayeh Belalat* [1990] 2 CLJ 775; [1990] 1 CLJ (Rep) 529 HC; and *Abdul Aziz bin Alla Pichai v. Fan Chin Siang @ Fun Kim Siong* [1997] 1 LNS 313 HC; and

C (2) that the various annuities and pension payments received by the deceased were actually "earnings" under s. 7(3)(iv)(a), as they were subject to tax under English law.

[8] The core issue which we have to address in this appeal is
D whether the said annuities and pension payments come within the meaning of the word "earnings" contained in s. 7(3)(iv)(a). The resolution to this core issue necessitates a discussion of the implications of the deceased's age at the time of the accident; and the meaning of the word "earnings".

E **Deceased's Age At The Time Of Accident**

[9] In order to put the plaintiff's claim for loss of support in proper perspective, it is necessary to refer to the relevant portions of s. 7 which read as follows:

F **Part III**

Fatal Accidents And Survival Of Causes Of Action

7. Compensation to the family of a person for loss
G **occasioned by his death.**

(1) Whenever the death of a person is caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages
H in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the
I Penal Code [Act 574].

(2) …

(3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):

Provided that -

(i) …

(ii) …

(iii) …

(iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:

(a) take into account that where the person deceased has attained the age of fifty five years at the time of his death, his loss of earnings for any period after his death shall not be taken into consideration …

[10] While s. 7 was enacted by Parliament for the benefit of the family of the deceased whose death was caused by a fatal accident and the action arising therefrom survives in favour of the family, such survival of action is subject to the proviso in s. 7(3)(iv)(a) which bars awards in cases involving individuals who have attained the age of 55 years at the time of their death. In other words, it precludes any award for loss of dependency where the deceased had attained the age of 55 years at the time of his demise.

[11] It is pertinent to note that s. 28A(2)(c)(i) of the same Act is substantially *in pari materia* with s. 7(3)(iv)(a). In considering s. 28A(2)(c)(i) in *Tan Kim Chuan & Anor v. Chandu Nair Krishna Nair* [1991] 1 CLJ 682; [1991] 1 CLJ (Rep) 441 SC, Abdul Hamid Omar LP (as he then was), speaking for the (then) Supreme Court, held as follows:

A It would be the function of this court to interpret the statutes where there is a *lacuna* or an area of ambiguity. We need only interpret the law if the intention of the legislature is not clear. This time honoured judicial trend has never been questioned by any authority and therefore before we exercise our power to
B interpret we must be convinced that the words to be interpreted are loose or inexact (p. 684).

In general, we have always been inclined to follow purposive and literal constructions which means that the literal meaning of an Act will be followed where that meaning is in accordance with the
C legislative purpose (p. 685).

[12] In *Tan bin Hairuddin & Anor, supra*, Abdul Malek Haji Ahmad J (later PCA) held that under s. 28A(2)(c)(i), a person aged 55 or more at the time the injury was sustained cannot be awarded any damages for the loss of future earnings.
D

[13] In *Abdul Aziz bin Alla Pichai, supra*, Nik Hashim J (later FCJ) held that s. 28A(2)(c)(i) was sufficiently clear and it could not be disputed that the Court had no power to award damages for loss of earnings for a plaintiff who was aged 55 years and above at
E the time of the accident.

[14] As s. 28A(2)(c)(i) and s. 7(3)(iv)(a) are substantially *in pari materia*, authorities which have judicially considered s. 28A(2)(c)(i) are useful to us in our deliberations on s. 7(3)(iv)(a). The
F interpretation which is given to s. 28A(2)(c)(i) is indeed applicable *mutatis mutandis* to s. 7(3)(iv)(a). In the present appeal, the intention of Parliament expressed in the proviso to s. 7(3)(iv)(a) is clear and unambiguous. It is to bar the plaintiff's claim for loss of support, as the deceased in this case was 68 years of age at the
G time of his demise.

Meaning Of "Earnings"

[15] In considering the plaintiff's contention that his claim is not caught by the proviso because the annuities and pension
H payments are not "earnings" under s. 7(3)(iv)(a), we note that the word 'earnings' is not defined in the Act. That being the case, the ordinary dictionary meaning applies.

[16] In *Black's Law Dictionary*, 'earnings' is defined as 'revenue
I gained from labour or services, from the investment of capital, or from assets.' In *'The New Shorter Oxford English Dictionary'*,

'annuity' is 'an investment of money entitling the investor to a series of equal annual sums', and 'earn' means receive or be entitled to money. Under s. 7(11), "pension" includes "a return of contributions and any payment of a lump sum in respect of a person's employment."

[17] We must also have due regard to the all-important fact that at the trial in the Sessions Court, the plaintiff had testified that the annuities and pension payments were subject to tax under English law.

[18] Based on the dictionary meaning of 'earnings' and 'annuity', above, the definition of pension in s. 7(11) and the plaintiff's own evidence that the annuities and pension payments which the deceased had purchased or invested during his lifetime are subject to tax under English law, it is our considered view that such annuities and pension payments are within the meaning of the word "earnings" contained in s. 7(3)(iv)(a). As the deceased was 68 years old at the time of his demise, there can be no award of loss of support arising from "earnings" under s. 7(3)(iv)(a). Therefore both the Sessions Court and the High Court were correct in law in dismissing the plaintiff's claim under this head.

[19] We are aware of the judgment of Mohd Noor Ahmad J (later FCJ) in *Lee In Fong & Satu Lagi, supra*, to the effect that the pension which the deceased drew as a Singapore police pensioner at that time of his death was not "earnings". However, in that case, there was no evidence there that the pension which the deceased was receiving as a Singapore police pensioner was taxable. On the other hand, the facts in this appeal show that the annuities and pension payments are taxable under English law. Therefore, *Lee In Fong & Satu Lagi, supra*, is clearly distinguishable.

Conclusion

[20] On the foregoing grounds, we answered the above core issue in the affirmative. We therefore found no merits in this appeal which we dismissed. We affirmed the concurrent decision of the High Court and the Sessions Court. We fixed costs of RM3,000 after hearing submissions. Deposit to the respondent (defendant) on account of the fixed costs.